Supreme Court, U.S.
FILED
APR 3' 1989
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 88-1070, 88-1075, 88-1385 and 88-1434

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, AND THE ASSOCIATED GENERAL CONTRACTORS OF VIRGINIA,

Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, *et al.*,

Respondents.

[Captions Continued on Inside Cover]

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

ASSOCIATED BUILDERS AND CONTRACTORS, INC., and the CONSTRUCTION INDUSTRY TRADE ASSOCIATIONS,
Petitioners,

v.

THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, *et al.*,
Respondents.

THE NATIONAL GRAIN & FEED ASSOCIATION, INC., and UNITED TECHNOLOGIES CORP.,
Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

ELIZABETH DOLE, SECRETARY OF LABOR, *et al.*,
Petitioners,

v.

UNITED STEELWORKERS OF AMERICA, *et al.*,
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OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, *et al.*,

Respondents.

No. 88-1075

ASSOCIATED BUILDERS AND CONTRACTORS, INC., and the CONSTRUCTION INDUSTRY TRADE ASSOCIATIONS,

Petitioners,

v.

THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, *et al.*,

Respondents.

No. 88-1385

THE NATIONAL GRAIN & FEED ASSOCIATION, INC., and UNITED TECHNOLOGIES CORP.,

Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

No. 88-1434

ELIZABETH DOLE, SECRETARY OF LABOR, *et al.*,
Petitioners,

v.

UNITED STEELWORKERS OF AMERICA, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

INTEREST OF THE AMICUS CURIAE

The National Association of Manufacturers of the United States of America ("NAM") is an association of approximately 13,500 companies and subsidiaries that together employ eighty-five percent of all manufacturing workers in the United States and produce more than eighty percent of this nation's manufactured goods. NAM is associated with 158,000 additional businesses through its Associations Council and the National Industrial Council.

Most of the NAM member companies are heavily regulated in many areas of their activities, at substantial expense to the member companies and to the consumers of their manufactured products. A significant portion of the expense is associated with a broad array of federal requirements to create, disseminate and keep records. Most of the regulation and recordkeeping requirements are not directly imposed on NAM members by statute; they are imposed principally by agency rules.

The members of NAM have been covered by a Hazard Communication Standard ("HCS") since 1983, and are not directly affected by the adoption of an HCS for non-manufacturers. However, the members of NAM are vitally affected by the Third Circuit's decisions undermining the procedural safeguards contained in the requirements of the Administrative Procedure Act ("APA") and the Occupational Safety and Health Act ("OSH Act") that agency rules only be adopted after notice and opportunity to comment. Likewise, NAM's members are adversely affected by the Third Circuit's restrictive interpretation of the Paperwork Reduction Act of 1980, a law which has benefited the productivity of American manufacturers by ameliorating the burdens of federally sponsored paperwork.

NAM therefore submits this brief as *amicus curiae*, with the consent of all parties, in support of the Petitions for Writs of Certiorari in order to assist the Court in evaluating the importance of the issues presented.

PRELIMINARY STATEMENT

These cases bring before the Court two major issues affecting the functioning of all federal administrative agencies. The first issue is whether the notice and opportunity to comment on a proposed HCS for manufacturers was sufficient under the APA and the OSH Act for the adoption of a final HCS for non-manufacturers. The second issue is the scope of the authority of the Office of Management and Budget ("OMB") under the Paperwork Reduction Act of 1980 to reduce paperwork requirements imposed by the Occupational Health and Safety Administration ("OSHA"). Petitioners seeks writs of certiorari in connection with two cases decided by the Third Circuit. *Associated Builders and Contractors, Inc. v. Brook*, No. 88-1075 (3d Cir., Nov. 25, 1988) (a consolidation of four petitions for review of administrative action), and *United Steelworkers of Am. v. Pendergrass* (USWA III), 855 F.2d 108 (3d Cir. 1988).

REASONS FOR GRANTING THE PETITION

I. THE THIRD CIRCUIT HAS REDUCED THE MINIMUM PROCEDURAL STANDARDS OF THE ADMINISTRATIVE PROCEDURE ACT BELOW THE PARAMETERS ESTABLISHED BY CONGRESS AND THE SUPREME COURT. THIS REDUCTION WORKS A SUBSTANTIAL HARDSHIP ON INDIVIDUALS AND ORGANIZATIONS THAT PARTICIPATE IN REGULATORY MATTERS AND DIMINISHES THE QUALITY OF RULEMAKING.

The United States Court of Appeals for the Third Circuit violated the APA and the OSH Act in adopting an HCS for non-manufacturers without permitting OSHA to provide non-manufacturers with notice and an opportunity for comment beyond that afforded by the original notice applying an HCS to manufacturers in 1982. 42 Fed. Reg. 12,092 (1982). Insofar as that court's action is seen as allowing rulemaking without notice and comment, the decision is a novel departure from settled law [1], is at odds with other Circuits [2], works a substantial hardship on individuals and organizations who participate in regulatory matters, disserves the government agency seeking the views of the affected public, and is deserving of reversal by this Court.

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[1] *See American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 536-40 (1981) (OSHA must show each specific provision of safety standard contributed to increased safety); *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. 607, 667 (1980) (plurality invalidated OSHA's benzene standard because of failure to explain how rule would benefit workers).

[2] *See, e.g., AFL-CIO v. Donovan*, 757 F.2d 330, 337-40 (D.C. Cir. 1985); *Chamber of Commerce of United States v. OSHA*, 636 F.2d 464 (D.C. Cir. 1980); *Ethyl Corp. v. EPA*, 541 F.2d 1, 48 (D.C. Cir. 1976), *cert. denied*, 426 U.S. 941 (1976).

A. This Court Should Resolve The Question of What Degree of Change Between Proposed and Final Rulemakings Triggers a Requirement For a New Proposal.

Both the APA and the OSH Act require OSHA to provide notice and opportunity for comment on proposed regulations before they become final. 5 U.S.C. § 553(b) (1982) and 29 U.S.C. § 655(b) (1982). Under order of the Third Circuit, OSHA published no proposed regulations on the application of an HCS to the non-manufacturer employers.

The Third Circuit justified its order prohibiting further notice by relying on its earlier decision in *American Iron & Steel Inst. v. EPA*, 568 F.2d 284, 293 (3d Cir. 1977) and similar decisions in the United States Court of Appeals for the District of Columbia. *See United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 n.51 (D.C. Cir. 1973). Those lower court decisions established that a final rule may differ from the proposed rule where the change is a "logical outgrowth" of the rulemaking proceeding. 647 F.2d at 1221; *NRDC v. EPA*, 824 F.2d 1258, 1283 (1st Cir. 1987) (stating that substantial changes can be made "as long as the final changes are in 'character with the original scheme' and 'a logical outgrowth' of the notice and comment.")

The proper scope of this "logical outgrowth" concept is

> an issue of great importance, which cannot help but become greater as time goes on and more and more administrative proceedings are conducted either directly under the Administrative Procedure Act, 5 U.S.C. § 553, or similar provisions in new Acts of Congress for review of agency action.

Eli Lilly & Co. v. Costle, 444 U.S. 1096, 1096 (1980) (Rehnquist, J. dissenting on denial of petition for writ of certiorari). Chief Justice Rehnquist's statement is

prophetic: the issue has continued to grow in importance, lacking needed guidance from the Supreme Court. The Court should review this case to resolve the critical question of how much change in a proposed rule is permissible without a reproposal begore final promulgation.

The application of a standard to an entirely new group of industries cannot be deemed a "logical outgrowth" of a proposed rule which did not previously affect those industries. The impacts of an HCS on the construction and agricultural communities differ significantly from the impacts on the manufacturing community initially covered.[3] In addition to qualitative differences between the affected communities, the quantitative change effected by extending the HCS from manufacturers to non-manufacturers eliminates any logic in the growth of the standard without additional notice and opportunity to comment.[4]

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[3] The 230% average turnover rate in the construction industry and the outdoor nature of construction work contrast with the "prototypical manufacturing workplace, which is generally a stationary worksite with a relatively stable workforce." Comments of the Associated General Contractors of America, Oct. 23, 1987, attached as Appendix 5 to the Petition for Review of a Final Rule of the Occupational Safety and Health Administration, *Associated Gen. Contractors v. OSHA* (3d Cir.) (No. 88-1070), at 13a.

[4] The August 24, 1987 expanded rule applied an HCS, without notice and opportunity to comment other than that afforded in 1982, to 4,503,879 theretofore uncovered establishments with a total employment of 58,890,236, of which an estimated 18,391,096 employees are exposed in the workplace to hazardous chemicals. 52 Fed. Reg. 31,852, 31,871. OSHA estimated the cost of the application to non-manufacturing employers to be $687.2 million in the first year, with substantial additional costs each year thereafter. *Id.* at 31,873. Indeed, without the benefit of a notice of proposed rulemaking, OSHA may have seriously underestimated both coverage and cost impact of its new rule. For example, the Association of General Contractors testified before OMB that compliance in the construction industry would require 58 million man hours in the first year with costs for retraining at 38 million man hours for subsequent years. In contrast, OSHA estimated the costs at 34 million and 8 million respectively for all industries.

The final rulemaking extending the HCS to non-manufacturers is not a logical outgrowth of the initial standard and should have triggered a new proposal to allow comment since the non-manufacturers did not have "a fair opportunity to present their views on the contents of the final plan." 824 F.2d at 1283. The error of the Third Circuit in bypassing the APA and OSH Act notice and comment requirements for the entire non-manufacturing sector of the nation's industry provides an important opportunity for the Supreme Court to clarify the standards for re-proposal of proposed regulations.

B. The Practical Inability of the Public to Follow the Enormous Range of Rulemaking Activities Which May Potentially, But Not Expressly, Affect Them Makes a Clear Standard For Notice and Comment Imperative.

In addition to the unfairness to the non-manufacturers here, the practical consequences of the Third Circuit's decision for all future rulemakings are worrisome. "Agencies could in the future publish vague, ambiguous notices in the Federal Register, adverting obliquely to certain issues or proceedings, and then, months or years later, promulgate final rules and claim that constructive notice had been given." *National Tour Brokers Assoc. v. United States*, 591 F.2d 896, 899 (D.C. Cir. 1978).

In each of the past five years, more than 3,000 proposed rules and 4,500 final rules have appeared in the Federal Register. Office of Management and Budget, Executive Office of the President, *Regulatory Programs of the United States Government, April 1, 1987 to March 31, 1988* 636.

Given this large number of federal rulemakings, those who are regulated and their associations, such as NAM, must limit the proposed rules that receive close attention.

When an agency announces, as OSHA did here,[5] that it will not adopt a standard for a class of the regulated community, members of that class typically pass on to other issues. Under the Third Circuit's rule, those excluded from regulation will nevertheless have to participate in rulemakings in which there is any shadow of an implication in the preamble that they might be included. This will lead to added expense and complexity for private and government parties.

The result for the courts is also worrisome. When an agency promulgates a final rule that excludes a sector of the regulated community and a review petition is filed, the seemingly excluded persons will have no choice but to intervene in the litigation to protect their interests. This will lead to unnecessary court interventions and will make such cases even more complex and burdensome.

Furthermore, the appropriateness, clarity, and efficacy of regulations which have not had the benefit of comments from all those potentially affected will be significantly diminished. "It is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data." *Portland Cement Assoc. v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974). OSHA itself recognized the need for notice and comment so that the final regulation could accurately reflect the differences amnong the groups covered. OSHA stated that the HCS as developed "focused on existing practices and desirable implementation methods in manufacturing industries," and urged the Third Circuit to permit reproposing the regulations before applying them to non-manufacturers. Petition for Rehearing and Suggestion for Rehearing *En Banc* of the Secretary of Labor (No. 83-3554) at 9. The need for a reproposal is evident from the record before OMB. Confusion over issues of coverage, scope and practicality raised by participants at the OMB hearings easily could

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[5] 47 Fed. Reg. 12,092, 12,101-12,102 (1982).

have been addressed and clarified through a rulemaking proposal.[6] The Third Circuit decision deprived the agency of the opportunity "to benefit from the expertise and input of the parties who file comments with regard to the proposed rule . . . ." *National Tour Brokers Assoc. v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978).

C. The Third Circuit Could Have Instead Imposed Detailed Time Deadlines on OSHA.

Whatever the frustrations of the labor organization petitioners with the pace of achieving their goal, the Third Circuit should not have meddled in agency procedure to speed up agency action.[7] The court could have imposed a reasonable time limit instead. The ability of courts to fashion remedies that achieve results without interfering with the agency's attempt to assure adequate notice and comment is amply demonstrated by the remand issued in *EDF v. EPA*, 852 F.2d 1316, 1331 (D.C. Cir. 1988) (ordering EPA to adhere to a schedule for fulfilling its statutory obligations).

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[6] For example, The National Druggist Association raised legitimate questions as to whether capsules which contain powders or liquids were exempt from the rule noting that if they were not, an additional $3,400,320 in compliance costs would be incurred by druggists. October 16, 1987 hearing before OMB at 174. Similarly, the Small Business Administration testified that OSHA had underestimated the first year cost impact by over one billion dollars. Statement of Charles A. Cadwell, U.S. Small Business Administration before the Office of Management and Budget, Oct. 16, 1987.

[7] The Third Circuit's repeated references to the time intervals between agency actions and court proceedings indicates that the Third Circuit may also have shared in this frustration. *See United Steelworkers of Am. v. Auchter*, 763 F.2d 728, 732 (3d Cir. 1985), and *United Steelworkers of Am. v. Pendergrass*, 819 F.2d 1263, 1265, 1266, 1269 (3d Cir. 1987).

II. COURTS SHOULD NOT INTERFERE WITH AGENCY ACTIONS THAT ARE LAWFUL AND REASONABLE. REVIEW IS NEEDED IN ORDER TO MAKE CLEAR THE VITALITY OF THE DOCTRINES EXPRESSED BY THE SUPREME COURT IN *VERMONT YANKEE* AND *CHEVRON*.

The Third Circuit ignored the principles of judicial restraint enunciated in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984) and *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978). *Vermont Yankee* limited the courts' ability to interfere in the procedural actions of agencies. 435 U.S. at 555. The Third Circuit violated this precept in a novel context that needs review by the Supreme Court. *Vermont Yankee* restrained the judiciary from imposing procedural requirements on federal agencies in *excess* of those required by Congress. In the present case, the Third Circuit interfered with the agency's chosen procedure by imposing procedural requirements *less* than those required by Congress and selected by the agency.

By compelling OSHA to skip over the procedures required by the APA and the OSH Act, the Third Circuit violated the *Vermont Yankee* principle that courts should not interfere with agency actions permissible under statute. Even assuming *arguendo* that the notice afforded non-manufacturing employers in the 1982 rulemaking was in theory legally sufficient to allow OSHA to go directly to a final rule, under *Vermont Yankee* the Third Circuit should not have ordered the agency to abandon its choice to collect more information and undertake a notice and comment rulemaking. Indeed the force of the *Vermont Yankee* rule is all the greater when, as here, the agency seeks to give more procedural safeguards and thereby avoid statutory and even constitutional questions of fairness. *See Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976); *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

The Court should review this case to assert the vitality of *Vermont Yankee.* Surely it cannot be true, as one commentator has stated, that *Vermont Yankee* is "largely one of those rare opinions in which a unanimous Supreme Court speaks with little or no authority." 1 K. Davis, Administrative Law Treatise 616 (2d ed. 1978), quoted and discussed in, Scalia *Vermont Yankee: The APA, The D.C. Circuit, and The Supreme Court*, 1978 Sup. Ct. Rev. 345, 371 (1978). It is time for the Court to explain the authority and authoritativeness of *Vermont Yankee.* The Court should review this case to emphasize "that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments." *Vermont Yankee*, 435 U.S. at 524.

III. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH A DECISION OF THE D.C. CIRCUIT AND LIMITS IMPROPERLY THE AUTHORITY OF OMB UNDER THE PAPERWORK REDUCTION ACT TO MINIMIZE PAPERWORK BURDENS IMPOSED ON THE PUBLIC.

A. The Importance of the Paperwork Reduction Act to the Hazard Communication Standard.

The Paperwork Reduction Act of 1980 ("PRA") is the culmination of longstanding efforts by Congress [8] to "minimize the Federal paperwork burden for individuals, small businesses, state and local governments and other persons." 44 U.S.C. § 3501(a)(1). The critical need for this law was established by the Commission on Federal Paperwork, which concluded in its final report that federal paperwork requirements imposed annual costs of 25

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[8] The Paperwork Reduction Act was a "rewrite" of the Federal Reports Act of 1942, and was intended to "strengthen the clearance process" established under the prior law. S. Rep. No. 96-930, 96th Cong., 2d Sess. 13, *reprinted in* 1980 U..S Code Cong. & Admin. News 6241, 6253.

to 35 billion dollars on private industry, and 8.7 billion dollars on individuals.[9] To minimize this formidable burden, Congress directed OMB to review all information requests proposed by agencies to determine whether such collection of information "is necessary for the proper performance of the functions of the agency," as well as whether the information "will have practical utility." 44 U.S.C. § 3504(c)(3) (1982). The effectiveness of the PRA in ameliorating the burden on the public has been great. Between 1981 and 1986, agencies subject to PRA review have reduced the paperwork burden imposed on the public by over 560 million hours annually[10] or 44 percent of the burden that existed in 1980.[11] The Administration estimated that the paperwork burden on the public in fiscal year 1988 would decrease by 66.1 million hours, representing the seventh year of reduction by the federal government since 1981.[12]

OMB adhered closely to its lawful authority in reviewing OSHA's final HCS and, based on an extensive record and detailed consultation with the agency, disapproved three limited provisions in the rule.[13] OMB's disapproval

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[9] *Final Summary Report of The Commission on Federal Paperwork* 5 (1977).

[10] March 10, 1988 Letter from James C. Miller III, Director, Office of Management and Budget, to President Ronald Reagan transmitting the Administration's Information Collection Budget for Fiscal Year 1988, 1.

[11] Executive Office of the President, Office of Management and Budget, *Regulatory Programs of the United States Government, April 1, 1987-March 31, 1988*, 1-1i.

[12] *See* March 10, 1988 letter from James C. Miller III, 1. According to the letter a net increase of approximately 140 million hours resulted from three federal statutes enacted in 1987.

[13] The Third Circuit, in ordering the Secretary to proceed directly to a final rule without the benefit of a notice of proposed rulemaking prevented OSHA from complying with 44 U.S.C. § 3504(h). That

of the requirement that material safety data sheets ("MSDSs") be exchanged by each employer at multi-employer worksites was based solely on the determination that such requirement "does not appear to be the least burdensome necessary for the efficient transmittal of hazard information in multi-employer workplaces." [14] OMB also disapproved the overly narrow scope of the exemption for consumer products, stating, "the record indicates that this exemption would continue to place under the HCS large number of consumers for which MSDSs would have little practical utility, and for which the burden of compliance would be substantial." [15]

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section requires an agency to notify OMB not later than publication of notice, of any proposal rule which includes a collection of information requirement. This important procedural requirement, sponsored by Senator Kennedy as Amendment 1177 of the Senate Judiciary Committee, is intended to coordinate Executive review of collection of information requirements in agency rulemakings with regulatory oversight by the Executive Office of the President by providing the agency an opportunity to respond to OMB comments. *See* Remarks of Senator Edward Kennedy, 126 Cong. Rec. 14,689 (daily ed. Nov. 19, 1980). Thus, the Court's short-circuiting of the APA also thwarted the critical interagency deliberative process required by the Kennedy Amendment.

[14] October 28, 1987 letter from Wendy L. Gramm, Administrator for Information and Regulatory Affairs, Office of Management and Budget, to the Honorable Thomas C. Komarek Assistant Secretary for Administration and Management, Department of Labor, disapproving the collection of information requests in the final HCS. The record is replete with examples where trade groups demonstrated in testimony before OMB that this provision of the HCS had no practical utility. These same groups provided numerous alternatives which would accomplish the same objective of workplace hazard communication without the full paperwork burden imposed by the rule. *Id.* at 7-9. *See also* October 28, 1988, "Comments and Request for Hearing by the Construction Industry Hazard Communication Coalition Proposed Revisions to OSHA Hazard Communication Standard" (53 Fed. Reg. 29,821), submitted to OSHA Docket Officer at 17-19.

[15] Letter of Gramm to Komarek at 8. The OMB record illustrated how OSHA's limited consumer product exemption (29 C.F.R.

OMB disapproved a third provision of the final HCS that would have exempted FDA regulated drugs to the extent that they are in "solid, final form for direct administration to patients." 29 C.F.R. §§ 1910.1200(b)(6)(viii)(1988). The OSHA exemption did not exclude drug capsules containing liquids or particles. The narrow scope of the exemption resulted in drug wholesalers initially having to distribute 4.8 million MSDSs despite the fact that a professional package insert of comprehensive hazard information is already included in "every single package of a prescription drug in this country." [16]

B. The Petition Should be Granted To Resolve the Conflict Between the Third and D.C. Circuits and to Reestablish the Director's Intended Role in Regulating the Paperwork Burden Imposed by Administrative Agencies.

The Third Circuit erred in ruling that the HCS requirement to collect and distribute MSDSs does not come within the reach of the PRA and that, because the recordkeeping requirement had a regulatory purpose under the OSH Act, it was exempt from PRA review. These two rulings misinterpret the law and undermine the important powers given to OMB. The Court should take this case so that OMB can fulfill its congressional man-

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§ 1910.1200(b)(6)(vii)) lacks practical utility. Under the OSHA exemption employers could not discern when the exemption would apply. Witnesses before OMB testified that this flaw would lead to exaggerated overcompliance causing a substantial paperwork burden involving the maintenance of MSDSs. Moreover, hazard information on consumer products was duplicative of that required by the Consumer Product Safety Commission. Transcript of OMB hearings on the *Paperwork Requirements of the Occupational Safety and Health Administration Hazard Communications Standard*, Oct. 16, 1987, at 90, 148-52.

[16] Testimony before OMB of the National Wholesale Druggists Association. *Paperwork Requirements of the Occupational Safety and Health Administration Hazard Communication Standard, supra* note 15, at 168-79

date to limit paperwork requirements imposed on members of NAM without significant public benefit.

The D.C. Circuit has interpreted the PRA's predecessor, the Federal Reports Act of 1942 (codified at 44 U.S.C. § 3501-3520 (1976)), to apply to the collection of all information required by a federal agency for any regulatory purpose, whether or not the information is furnished directly to the agency. *Action Alliance of Senior Citizens v. Bowen*, 846 F.2d 1449 (D.C. Cir. 1988). The D.C. Circuit Court rejected arguments that the Federal Reports Act applied only to documents furnished to an agency. Interpreting the PRA, the court wrote that "under the Paperwork Act . . . OMB holds the same substantive power as it did under the [Federal] Reports Act. Where it determines that collection of information is unnecessary, the Agency may not proceed with the collection." *Id.* at 1453. The Court continued "[a]ppellants cannot seriously believe . . . Congress was concerned solely or primarily with private parties' costs of mailing data to Washington; it is the record-keeping and data-gathering that constitute the burden." *Id.*

The attempt by the Third Circuit to distinguish *Action Alliance* and thus avoid the conflict is unsuccessful. The D.C. Circuit quoted the paperwork requirement that OMB lawfully disapproved: a "'written self-evaluation of [the federal fund recipients'] compliance under the [Age Discrimination] Act' . . . [and a] self evaluation available on request to the agency *and to the public.*" *Id.* at 1452 (emphasis added, citations omitted). This requirement is little different from the HCS requirement that the MSDSs be made available to employees and "upon request, to . . . the Assistant Secretary [of Labor] . . . ." 29 C.F.R. § 1910.1200(g)(11) (1988).

The Third Circuit's decision is also inconsistent with the PRA's legislative history [17] and, without so much as

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[17] The Senate Report includes within the coverage of the PRA information collected for purposes of disclosure to the public. The

a mention, rejects the OMB interpretation of the PRA. OMB's regulations, which were promulgated on March 31, 1983, define the "collection of information" as:

> the obtaining or soliciting of information by an agency from ten or more persons by means of identical questions, whether such collection of information is mandatory, voluntary, or required to obtain a benefit. For purposes of this definition, the "obtaining or soliciting of information" includes any requirement or request for persons to obtain, maintain, retain, report, *or publicly disclose information.*

5 C.F.R. § 1320.7(c) (1988) (emphasis added). Subsection (2) of Section 1320.7(c) further provides, in part, that:

> *Requirements* by an agency, a person *to obtain or to compile information for purpose of disclosure to members of the public* at large, through posting, notification, labeling, or similar disclosure requirements, constitute the "collection of information" whenever the same requirement to obtain or compile information would be a "collection of information" if the information were directly provided to the agency.

(Emphasis added). Thus, the Third Circuit, without explanation, rejected a "permissible construction" of the

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Senate Report addreses public disclosures required by the Securities and Exchange Commission stating, "In this connection, federally mandated disclosures to the public by issuers and certain owners of securities are central to carrying out the purpose of the Federal Securities Laws." S. Rep. No. 96-930, 96th Cong., 2d Sess. 39, *reprinted in* 1980 U.S. Code Cong. & Admin. News 6241, 6279. This view was reiterated by Sen. Chiles, the Sponsor when Congress considered amendments to the PRA in 1984. He explained:

> [t]he notion that the law was dedicated primarily to forms, questionnaires and surveys 'and not to other instruments such as reporting, recordkeeping, and disclosure requirements which are means to carry out federally sponsored collections of information' is a fundamental misreading of what the law states [and] what Congress in 1980 intended. . . .

S. Rep. No. 576, 98th Cong., 2d Sess. at 43.

statute by the administering agency, contrary to *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 866 (1984).

The Third Circuit also mistakenly and substantially narrowed the scope of the PRA by ruling that 44 U.S.C. § 3518(e) (1982) prevents OMB from performing its statutory function with respect to paperwork requirements when the rulemaking "embodies substantive policy decision-making entrusted to the other [non-OMB] agency." *United Steelworkers of Am. v. Pendergrass*, 855 F.2d 108, 112 (3d Cir. 1988). This determination also conflicts with the D.C. Circuit. *Action Alliance*, 846 F.2d at 1454-55. While there may on occasion be tension between OMB duties with respect to paperwork requirements under the PRA and another agency's duties under another law, the Third Circuit's meat ax approach—OMB always looses—"carve[s] so large a slice from OMB authority" that it calls for review and adjustment by the Supreme Court. *Action Alliance*, 846 F.2d at 1455.

The plain language of the PRA shows that Congress vested sole authority in OMB to determine whether a proposed paperwork requirement imposed by a federal agency is necessary or useful in achieving a substantive policy. Under the goal of ensuring that rules of federal agencies minimize the information burden on the public, Congress ordered federal agencies "not to conduct or sponsor the collection of information unless, . . . (3) the Director has approved the proposed information collection request . . . ." 44 U.S.C. § 3507(a) (1982). Congress then directed that the function of the Director to clear information collection requests shall include a determination of whether a collection of information request "is necessary for the proper performance of the functions of the agency," as well as whether the information "will have practical utility . . . ." 44 U.S.C. § 3504(c)(2) (1982). There is nothing in the PRA that terminates this authority merely because the agency or anyone else claims that the information collection request also has a

direct regulatory function. *Action Alliance*, 846 F.2d at 1455.[18]

OMB acted on a well-developed record and after detailed consultation with OSHA. OMB carefully focused its activities *only* on requirements for the collection of information and restricted its disapproval to such requirements, leaving intact the underlying regulatory approach of OSHA. The disapproved provisions involve the collection and maintenance for purposes of public disclosure and recordkeeping of hundreds, thousands, and in some cases millions of pages of material safety data sheets,[19] precisely the area of concern at which the PRA is aimed. The Court should grant the petitions to assure OMB's ability to control such excessive and costly paperwork requirements affecting NAM and all members of the public.

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[18] The Third Circuit paid little attention to relevant legislative history when it construed § 3518(e) to deny the Director of OMB the authority to review agency rules. Prior to and during consideration of the PRA, Congress understood the Executive already to have the authority to intervene on substantive points of other agency rulemakings. *See* Pub. L. No. 94-78, § 4 (August 9, 1975) amending The Council on Wage and Price Stability Act, Pub. L. No. 93-387 (August 24, 1974).

[19] *See* OMB Docket 1218-0072 including written submissions accompanying April 2, 1987 and October 16, 1987 transcript of public hearings. For example the Small Business Administration estimated that a typical plumber must maintain 500 MSDSs compared with OSHA's estimate of 12. Ex. 2-21 (October 16, 1987). One contractor from Minnesota estimated that 55 file cabinets to maintain MSDSs may be required at a typical construction high rise site. Oct. 16, 1987, Transcript at 109.

CONCLUSION

For these reasons, and upon the entire record, the petitions for writs of certiorari should be granted in both *Associated Builders and Contractors, Inc. v. Brock* and *United Steelworkers of Am. v. Pendergrass* (USWA III).

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Date: April 3, 1989